

EXHIBIT 5

Landino comments to EPA as panelist regarding Pesticides, Endangered Species and the Clean Water Act. 6/25/03

What's Up?

I'm here to discuss NOAA Fisheries perspective regarding the status of ESA s. 7 consultations on the registration of pesticides under FIFRA. I've been involved in the pesticides and salmon issue at the policy level since 1998 when NMFS promulgated our 4d rules applying the take prohibitions to threatened salmon ESU's on the west coast. During the comment process, we heard from EPA's Office of Pesticide Programs – they did not appreciate how we characterized pesticides in our rule. At the same time, I was involved in Washington state's Agriculture Fish and Water forum, that had representation from state, federal caucuses and of course the agriculture industry, among others. It was clear to me from that experience that there were disconnects between agencies (EPA/OPP and NOAA Fisheries & USFWS) and a high level of controversy regarding whether it was necessary or appropriate for EPA to consult with the Services on pesticide registrations – after all (it is argued by some) the registration process under FIFRA adequately protects fish and wildlife.

Begs the larger policy questions – 1) How is it possible that the EPA registration process does not do enough to protect ESA listed fish (and wildlife)? 2) What can we do to make it so? Answers: 1) the FIFRA process is not set up to ask or answer all of the right questions that lead to the kinds of protections offered under the ESA (no surprise to me). There are fundamental statutory and regulatory differences (come back to these). And 2) EPA can do what every other action agency must do if their action affects T & E species, consult with the services under section 7. That is a really big job, given the number of pesticides, state of the science regarding understanding effects to essentially hundreds of species.

Alternatively – the federal government can declare the FIFRA process is adequate to protect fish and wildlife via a rulemaking process and/or develop counterpart regulations modifying the ESA process as applied to EPA and pesticide registrations.

What's So?

While nothing really was happening to reconcile the issue, EPA was sued in two separate lawsuits ²⁰⁰² the Washington Toxics Coalition v. EPA in the U.S.

65 District Court in western WA; and the Californians for Alternatives to

CATS

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Toxics (et al) v. EPA in U.S. District Court in northern CA. The agencies

~~hands~~ were forced into court ordered s. 7 consultation.

Facts: 1) EPA/OPP began sending us consultation initiation pkgs last July.

We now have 15 in hand including: propargite, diazinon, thiobencarb, chlorpyrophos, and carbaryl.

opinion *fact*

2) It's not going well or fast working with EPA. Many many conference calls, closed door meetings, etc. are occurring and at high policy levels (including EPA, FWS, NMFS, attorney's representing everyone, CEQ, OMB, DOI, USDA) - while cooperative interagency discussions necessary to successfully complete s. 7 consults - are NOT happening.

What are some of the fundamental differences between ESA and FIFRA?

They include:

ESA
Avoid jeopardy to the species
Minimize take

Conserve species and
their ecosystems

FIFRA
-uses a "risk based" approach
-no unreasonable adverse effects to
the environment

-standard acute and chronic toxicity
testing & environmental fate & effects
data

ESA

FIFRA

must use BAS, with benefit of
doubt to the species

no destruction or adverse
modification of critical habitat

prevent unreasonable effects on non
target species or sites

Opinion

** I believe the clear differences in statutory intent and focus

preclude the option of declaring FIFRA equates to ESA protections to T &
E species.

What are some of the issues that have surfaced in the technical and policy

Discussions thus far? Here's a short list:

- 1- definition and interpretation of BAS
- 2- effects of pesticide inert ingredients, surfactants, [&]degradates rather than simple consideration of effects of active ingredients only.
- 3- Effects of mixtures in formulations, tank mixtures and of course in the environment (synergistic and additive effects).
- 4- Sublethal effects to various salmonid life history stages, *the import of this.*
- 5- Spatial and temporal pesticide exposure modeling and validation
- 6- Risk characterization pesticide exposure and population responses (e.g. reproduction, numbers and distribution).

7- EPA's (OPP/FEAD and EFED) use of the 1986 standard procedures rather than the 1998 Ecological Risk Assessment guidelines intended for use EPA wide. *(that we find much superior).*

What's Next?

Who knows? Many things are possible.

- ① Counterpart regulations may end up being developed that dramatically alter the ESA as applied to EPA. This could include EPA self certifying and *essentially* short circuit the s. 7 process. *as currently designed.*
- ② We could complete s. 7. (unlikely). It is my goal to at least complete one or two formal consultations, perhaps propargite and or diazinon, prior to altering the regulatory landscape via rulemaking.
- ③ Most likely in the short term, we will be subject to direction coming from the courts as the lawsuits (and other) play out.